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IN THE

Supreme Court of the United States

October Term, 1943.

No. 362.

AUGUSTUS P. NORTON, Deputy Commissioner for the Third Compensation District,

Petitioner,

v.

WARNER COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1943. No. 362.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT,

Petitioner,

v.

WARNER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 6-12) is reported in 45 F. Supp. 835. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 14-18) is reported in 137 F. (2d) 57.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 17, 1943 (R. 18). The petition for certiorari was filed September 17, 1943, and was granted November 8, 1943 (R. 20). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

COUNTER-STATEMENT OF THE CASE.

This is a claim under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424 (33 U. S. C. Chap. 18, Sec. 901 et seq.), for injury sustained by Nicholas Rusin aboard Warner Barge No. 59, owned and operated by the respondent-employer, Warner Company, while the claimant was engaged in turning the capstan to bring his unloaded barge upstream and alongside a pier in the Schuylkill River. Answer was filed admitting the disability, but denying that there was any jurisdiction, as the claimant was within the exempt class of "master or member of a crew of any vessel" under Section 3 (a) (1) of the Longshoremen's Act.

The Deputy Commissioner found as a fact that "the vessel on which he (Rusin) was injured had no motive power of its own; that the movement of the barge was confined within about 30 miles; that he was the only person employed aboard the barge" (R. 7). The Deputy Commissioner therefore concluded that Rusin had no other duty in connection with the vessel's operation than handling lines and was not "a master or member of the crew of any vessel". The Deputy Commissioner ignored the admitted fact that Rusin had no duties with respect to the cargo and was continually on watch under way (R. 4, 5).

The respondent-employer is a Delaware corporation engaged in the production and sale of sand and gravel, maintaining and operating a considerable fleet of dredges, barges and tugs upon the Schuylkill, Delaware, Christiana, Cooper and Rancocas Rivers within a sixty mile circumference extending from about Trenton, New Jersey, on the north to Wilmington, Delaware, on the south. The main plant of the Warner Company is at Morrisville, Pennsyl-

vania, which is on the Delaware River, just south of Trenton, and the chief distribution points are at Philadelphia on the Delaware and at Wilmington on the Christiana River. It was the usual practice to load barges and tow them in flotillas to a convenient distribution point, there to await orders which might be weeks later.

The statement of facts contained in the opinion of the District Court and again in the Circuit Court of Appeals is complete and acceptable to the respondent. There has been at no time any conflict as to the facts.

In the hope that a restatement may re-emphasize the character of Rusin's employment and duties, as one who had permanent connection with and participated in the operation of his vessel under way and at all times, counsel submits the following outline of the transcript:

1. Rusin described himself simply as a "boatman" (T. p. 2),
2. who was hired as "an experienced seaman" in May, 1936, and worked continuously for the twenty months to his injury on March 11, 1938 (T. pp. 3, 7) on
3. the Warner Company Barge No. 59 which was non-self-propelled and without steering equipment, of 273 gross tons, documented with official No. 170340, and was usually towed in flotilla formation (T. pp. 5, 15).
4. Rusin lived alone, sleeping and eating on his barge, which had complete living quarters (T. pp. 2, 3, 8).
5. He was a member of the National Boatmen's Union and was paid by the month (T. pp. 2, 8).

6. Rusin's Barge No. 59 was navigated out of Philadelphia, Pennsylvania, throughout a sixty mile circumference, including Wilmington, Delaware, on the south, Morrisville, Pennsylvania, on the north and the Delaware and Schuylkill Rivers, Cooper's Creek, Christiana River and various tributaries in Pennsylvania, New Jersey and Delaware. The Barge No. 59 was away from its loading dock for weeks at a time (T. pp. 2, 8).

7. When under way Rusin was under the "authority of the captain of the tugboat to demand", but had charge of the operation under way of a number of vessels in the flotilla (T. p. 5).

8. Rusin responded to the tug signals and performed all necessary duties in connection with the operation of his vessel, which included (T. p. 4)

9. making fast, requisitioning, slacking and adjusting lines to dock and other vessels (T. p. 4),

10. sounding and reporting leaks; pumping (T. p. 4),

11. putting out and caring for navigation lights under way (T. p. 4).

12. He had no duties whatsoever in connection with the handling of cargo and had no shore duties (T. p. 5).

13. Rusin was injured when he was on watch on his barge afloat on the Schuylkill River, turning the capstan to bring his boat alongside the pier by taking up a moored line (T. p. 3).

STATUTE INVOLVED.

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (33 U. S. C., Chap. 18) provides inter alia as follows:

"Sec. 2. Definitions.

(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

"Sec. 3. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of disability or death of—(1) a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

"Sec. 5. Exclusiveness of Liability.

The liability of an employer prescribed in section 4 of this chapter shall be exclusive and in place of all other liability of such employer to the employee. . . ."

QUESTION PRESENTED.

Whether the finding of the Deputy Commissioner that a bargeman is not "a master or member of a crew" within the exclusionary provisions of Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. sec. 903 (a) (1)) is conclusive where the basic facts competently found by the Commissioner rightly call for a different conclusion.

SUMMARY OF ARGUMENT.

I. Although the findings of fact by the Deputy Commissioner are conclusive, it remains the duty of the appellate courts to determine that his conclusions of law are supported by substantial evidence. The facts herein are admitted and the only question is as to their sufficiency. It is maintained that there is no evidence of any cargo or shore duties by Bargeman Rusin and no inference can be drawn, simply from the humble nature of his duties, to the effect that Rusin was not a master or member of the crew.

II. A bargeman, like any other employee on navigable waters, may or may not be a master or member of the crew. It is always a question of his duties under the circumstances and the Deputy Commissioner was wrong in finding Rusin not exempt merely because he was alone on a wheelless non-self-propelled barge.

III. Each employee should be classified by analyzing his duties as they pertain to navigation, using that term in the broad sense to include all who further the purpose of the vessel. Even if we limit "navigation" to include only those whose primary concern is the passage of the boat

through the water, Rusin's duties were exclusively navigational.

IV. The petitioner concedes that Rusin's duties pertained entirely to navigation while in tow, and that similar inference might be drawn as to the character of his duties at all times, but the petitioner argues that this makes no difference because the appellate courts have a limited jurisdiction over cases arising under the Longshoremen's and Harbor Workers' Act. The petitioner concedes that such a principle makes for inconsistency from the same court on the same facts, but advances the superior argument of finality. It is denied that expedition requires wrong conclusions or absolute dictators in administrative bodies. It is denied that inconsistent decisions by the same court under the Jones Act and under the Longshoremen's Act will facilitate even finality.

V. The conclusion of the Circuit Court that Rusin was a master or member of the crew and hence exempt, on the basic facts found by the Deputy Commissioner, should be confirmed.

ARGUMENT.

I. It Is the Duty of the Appellate Courts to Ascertain Whether the Jurisdictional Finding of the Deputy Commissioner Is Supported by the Substantial Weight of the Evidence.

The petitioner and respondent are agreed upon the facts in this case, which were not disputed even before the Longshoremen's Commissioner. Respondent disagrees only with petitioner's characterization of Rusin's duties as those of a harbor worker because some of them could have been performed by local mechanics. The District Court and the Circuit Court of Appeals below are agreed that the facts as found by the Longshoremen's Commissioner are conclusive, and no attempt is made by counsel to dispute that fundamental principle as established in a series of cases terminating with *South Chicago Coal & Dock Co. v. Bassett*, 104 F. (2d) 522, 309 U. S. 251. The Third Circuit Court of Appeals has laid down only the corollary principle that "a Commissioner's conclusion that one is or is not 'a master or member of a crew' is not binding upon a reviewing court, if the basic facts competently found by the Commissioner rightly call for a different conclusion". It is respectfully submitted that this extender is equally sound and precedented.

This is no more than was said by this Court in *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 253, 258, in approving the Circuit Court action therein:—

> "The court of appeals found that . . . the District Court was precluded from weighing the evidence, being required to examine the record and ascertain whether there was any evidence to support the com-

missioner's finding. . . . *It was the duty of the District Court to ascertain whether it was so supported.*" (Italics ours.)

Crowell v. Benson, 285 U. S. 22, determined the constitutionality of the Longshoremen's Act generally and first attempted to define the boundaries of the deputy commissioner's responsibilities. Petitioner has referred to this case as supporting his argument that the question of exemption is one of fact to be expertly and finally determined by the deputy commissioner. When the language of this Court is read in its context, however, there is basis only for the opposite conclusion.

It was disputed therein whether the relationship of master and servant existed; the commissioner found it did; the district court took testimony *de novo* and found it did not; the circuit court and this court sustained the district court. The large question before the court was the right of trial *de novo* in the district court. In all events, however, this court was agreed upon the right of judicial review (page 54):—

"The act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent and consequences of the injuries. . . . Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made, according to familiar practice, by commissioners . . . or assessors; and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. . . . A different question is presented where the determinations of fact are fundametal or

> 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme."

In *Crowell v. Benson*, this court distinguished the procedure to govern proof of the facts of injury as opposed to the facts of jurisdiction and it is submitted the facts relating to exemption partake of the nature of jurisdictional facts. This conclusion is independent of the right to *de novo* hearing.

It is in order to note that this court, while recognizing from the beginning the desirability of finality, issued a warning against unrestricted power in the deputy commissioner (page 57):—

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect, finality in law."

In his dissenting opinion in *Crowell v. Benson*, Mr. Justice Brandeis concerned himself with the denial of the requirement of a *de novo* hearing before the district court in jurisdictional matters, but he too recognized the judicial function to review the record (page 88):—

> "The proceedings of the deputy commissioners are endowed with every substantial safeguard of a judicial hearing. Their conclusions are, as a matter of right, open to reexamination in the courts on all questions of law; and, we assume for the purposes of this discussion, may be open even on all questions of the weight of the evidence."

The petitioner gives lip service to the doctrine that there must be substantial evidence to support the Referee. On page 15 of petitioner's brief it is stated: "As a finding of fact such a determination by the administrative agency *must of course* have 'warrant in the record' and a reasonable basis in law."

In the petition for certiorari, and now in the brief presented by petitioner, however, it has been urged in effect that the conclusions of law of the Commissioner relating to jurisdiction are as binding as his findings of fact. The petitioner concedes there must be substantial evidence to support the non-application of the exemptive provision, but then goes on to argue that anything which the Commissioner decides must be accepted. Presumably the petitioner would not follow this argument to the logical conclusion that there should be no appeal from a Commissioner's conclusion that the sum was five where the parts were two and two. Petitioner would thus deny even the right to appeal from a Commissioner's conclusions where there was no scintilla of evidence to support them. It would be similar to a denial of a right of appeal from a jury verdict where the trial judge should not have allowed the case to go to the jury for want of evidence.

It is respectfully submitted that this Court, in support of the proposition that the findings of fact of the Commis-

sioner must not be disturbed, never intended to make the Longshoremen's Commissioner an absolute dictator over the jurisdictional disputes before him. In the case of *Davis v. Department of Labor*, 317 U. S. 249 (December 14, 1942), this Court did not hesitate to disregard the findings of four lower tribunals when a different legal conclusion as to jurisdiction was indicated.

It is interesting to note that in the much cited case of *Diomede v. Lowe*, 87 F. (2d) 296, certiorari denied 301 U. S. 682, the finding of the Deputy Commissioner of no jurisdiction because the bargeman was a master or member of the crew, was set aside.

If it be seriously urged by petitioner that there is herein substantial evidence that claimant was a harbor worker as opposed to a master or member of the crew, it must further be argued by the petitioner that every employee aboard a non-self-powered wheelless vessel is a harbor worker. This proposition is an unrealistic and discredited attempt at simplification and will be denied until Congressional amendment is made. *Cf. Cantey v. McLain Line, Inc.*, 32 F. Supp. 1023; 114 F. (2d) 1017; 312 U. S. 667, *Bowen v. Shamrock Towing Co.*, CCA 2, No. 131, Oct. Term, 1943 (decided Dec. 29, 1943). Admittedly, the determination of disputed facts is for the Commissioner and, further, there may be a twilight zone where the Commissioner must draw inferences, but where, as here, there are no non-maritime, harbor or cargo duties, the Commissioner cannot be permitted without recourse to call the employee a harbor worker.

Petitioner concedes that "a substantial if not the major part of his (Rusin's) functions were those more commonly performed by a harbor worker" (Brief p. 22). It is even

admitted that Rusin's duties under way were entirely navigational, but it is attempted to negative that by averring: "These duties were performed only while in tow" (Brief p. 23). Pumping, repairing leaks, and adjusting lines are improperly called the duties of a harbor worker. Even conceding that they may be performed by a harbor worker on occasion, that did not make Rusin a harbor worker because he performed them. Rusin's occupation was a continuous one; this is not the case of a member of a crew who signed off and became a watchman in port. He was on twenty-four hour duty and generally en route with a full cargo, if not at all times under way. The classification of the employee does not change because the vessel is moored. *Bowen v. Shamrock Towing Co.* (2d CCA, December 29, 1943).

The argument of the petitioner goes so far that, if adopted, all members of a tug crew would be harbor workers because they have these same humble maritime duties of providing for the safety of the vessel. Undoubtedly certain jobs aboard a vessel are similar to those in an office building, but the employment character of the doer is fixed by his relationship to his vessel.

II. The Legislative Exemption of "Master or Member of a Crew of Any Vessel" Should Not Be Judicially Limited by Etymological, Geographical, Physical or Economic Rules of Thumb.

This principle should not be a matter of argument as all hands recognize the *South Chicago* statement that: "The word 'crew' does not have an unvarying legal significance." Petitioner has, however, construed this to mean that there is no rule of law whatsoever controlling the Com-

missioner, and that in any event the Commissioner can draw sufficient inferences from the physical surroundings of the employment.

Granting that it is desirable to expedite decisions and payments in cases of this character and that it would save mental turmoil to find a mathematical formula which could be applied so that each case showed white or black, there is no such practical procedure which accomplishes even substantial justice. This is not an unusual hardship which must be over-ridden for administrative purposes, especially since, percentage-wise, there are few of these jurisdictional disputes.

It is difficult, and not too helpful to attempt, to find any completely consistent thread running through the lower court decisions dealing with this question of exemptive jurisdiction. The varying duties of the bargemen in each case must be analyzed and the logic of the decisions is frequently distorted. It appears fanciful to counsel to argue from the etymology of the exemptive words, as some courts have done in denying exemption to a solitary bargeman, that he cannot be a master without a crew and cannot be a crew because that is a collective noun. Equally irrational in application is the attempt to make the exemption depend on whether a vessel's operations are confined within the limits of a harbor, since harbors are very different in extent and character. It has been similarly argued that there can be no exemption simply because there is no engine or no wheel, although a barge of the character here involved is a larger and more seaworthy craft than many vessels with both wheel and power. The petitioner herein has for the first time urged that the exemption be denied because frequently the economic status of a bargeman differs from

that of an offshore seaman in that the latter may be forced to accumulate his pay during a voyage and may enjoy certain hospital services. The distorted emphasis of the petitioner on the fact that Rusin took some orders from a port captain stationed on land and on the fact that Rusin's boat was more often awaiting tow than under way, illustrates this same wrong emphasis on irrelevant factors.

The determining factor of jurisdiction should be the character of the employee's duties at the time of his injury. The Commissioner and the courts should apply the rule of "duties under the circumstances" and not just emphasize isolated criteria. In determining the duties it will be necessary to consider all the incidents of his general employment, but only as they relate to his specific job at the moment, and not as absolute denominators.

To allow any one factor to be conclusive would make for incongruous results. If the number of men aboard the boat constitutes the final test, then a seagoing solitary bargee would be under the Longshoremen's Act, whereas, if he had a cabin mate on the same boat, under the same conditions, he would be under the admiralty jurisdiction. If the test is the harbor's limits, then we would find no exemption for seamen on thirty mile trips as in New York Harbor, but a contrary result on a cross-river towage of a few miles. It might even be urged that a different rule applies if a bargeman be thrifty or impecunious. The obvious incongruities arise because the duties of a seaman are not reflected necessarily by the physical character of his vessel.

It is respectfully submitted that this Court indicated dismissal of such rules of thumb as proper criteria for jurisdiction by the decision in *Cantey v. McLain Line, Inc.*,

32 F. Supp. 1023; 114 F. (2d) 1017; 312 U. S. 667, where an admiralty action was remanded for trial after the District and Circuit Courts had dismissed the cause of action of a bargeman who was the sole employee of a non-self-propelled wheelless scow. The lower courts had followed *Diomede v. Lowe*, 87 F. (2d) 296, CCA 2nd, certiorari denied 301 U. S. 682, and *DeWald v. B. & O. Railroad Company*, 71 F. (2d) 810, CCA 4th, certiorari denied 293 U. S. 581, into the blind alley of conclusion which results from automatic denial that such a bargeman can be a master or member of a crew.

Petitioner purports to find comfort for his theory of "overlapping" jurisdictions from *Cantey v. McLain Line Inc.*, 312 U. S. 667, and also from the recent decision of *Bowen v. Shamrock Towing Co.*, (2d CCA December 29, 1943). Both of these cases were under the Jones Act, both arose in the Second Circuit, and in both the District Court dismissed for lack of jurisdiction on the precedent of *Diomede v. Lowe*, which also was decided by the Second Circuit Court of Appeals. Both cases were remanded for trial. *Bowen v. Shamrock*, far from being an extension of liability on the part of the shipowner, was recognized by the Second Circuit Court as a limitation on *Diomede v. Lowe*, arising out of the *McLain* decision by this Court. No longer does the fact of solitariness aboard a wheelless barge prevent a man from being master or member of a crew. Certainly the rules of classification are varying and elastic, which is not, however, to say that rules do not exist.

III. A Master or Member of a Crew Is One Whose Duties Pertain to Navigation, Assisting in the Operation of His Vessel Under Way and at All Times.

In attempting to be practical and expeditious, there can be a tendency in jurisdictional cases to be infatuated with words. Defining definitions is unproductive and it may well be that the term "master or member of a crew of any vessel" is itself sufficiently fundamental. In the *South Chicago* case this Court characterized the claimant therein as non-exempt because his "duties did not pertain to navigation". That judicial interpretation of legislative language appeals as being as simple and as effective as it is possible to be in cases where the line of demarcation depends on the circumstances. It is respectfully submitted that, in the interpretation of the exemptive provisions of the Longshoremen's Act, the only question should be whether the duties of the claimant pertain to navigation, thus qualifying him as a master or member of a crew of any vessel.

In *South Chicago v. Bassett,* this Court adopted the view of Judge Hough in *The Buena Ventura*, 243 F. 797, 799, where he considered any one who served the ship in her navigation was a member of the crew. A number of the lower courts have recently adopted this "navigation" test. Although the facts in *Puget Sound Freight Lines v. Marshall,* 125 F. (2d) 876, 879 (CCA 9th, February 19, 1942) are exactly opposite, in that the claimant was described as a "traveling stevedore", the case is typical in pointing out that: "The distinction between a longshoreman and a crew member seems to hinge upon whether or not the employee is 'naturally and primarily on board to aid in her navigation' ".

In the Seventh Circuit, in *A. L. Mechling Barge Line v. Bassett*, 119 F. (2d) 995, 998 (May 16, 1941) the court held a cook to be a member of the crew and said:—

> "A reading of the cases makes it rather plain, that while numerous facts have been taken into consideration in distinguishing between a longshoreman and a member of the crew, the fundamental distinction, generally recognized, has been whether the employee was permanently attached to a ship engaged in navigation."

In the First Circuit, *Carumbo v. Cape Cod SS. Co.*, 123 F. (2d) 991, 995 (Dec. 3, 1941) the court defined a member of the crew within the exemptive clause, as follows:—

> "The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a 'member of a crew'."

In the Fifth Circuit, the court in *Henderson v. Glens Falls Indemnity Co.*, 134 F. (2d) 320, 322 (March 12, 1943), certiorari denied 319 U. S. 756, recognized that a "bargeman" of a one-man barge may be within the scope of the Longshoremen's Act. The court said:—

> "It is well settled by the authorities that a bargeman may be or may not be, within the exclusion from the Compensation Act, 33 U. S. C. A. Sec. 902 (3), a member of the crew of a vessel according to the facts of the particular case."

The District Court herein recognized the validity of the "navigation test", but missed the point in holding that the claimant's duties did not pertain to navigation because

"Rusin as bargemaster could not set his own course or control or change it at any time". (Record p. 8) Any such definition of navigation is too limited, as is immediately evident when it is realized that this would eliminate all employees on all craft which had to be towed and practically all other seamen on a steamship except the licensed personnel and quartermaster. Navigation is not limited to putting over the helm; we submit it includes all duties necessary for the purpose of the vessel. Certainly it embraces duties essential to the safety of the vessel qua vessel, which is this case.

This Court has repeatedly heretofore had occasion to define "navigation". In the case of *The "Sylvia"*, 171 U.S. 462 (1898), the question concerned the applicability of the exemptive provisions of the Harter Act, which relieved of all responsibility for damage by "fault or error in navigation or in the management of the vessel". "Navigation" and "management" have been used regularly as synonymous terms. It was held there was no liability for failure during the voyage to close certain iron shutters, because this was an error in navigation. The court said on Page 466:—

> "the words 'navigation' and 'management' . . . include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words."

To define "navigation" in the limited manner urged by the petitioner would make for unnecessary confusion and

would involve either the reversal of all previous decisions or the creation of a special application thereof to this limited class of bargemen. It seems preferable to continue the well established principle that all those maritime employees who are permanently attached to a vessel which usually operates beyond the confines of a harbor are in navigation. Thus a musician, *The Sea Lark*, 14 F. (2d) 201; a cook, *Ex Parte Kogi Saito*, 18 F. (2d) 116; and a porter, *Spinetti v. Atlas SS. Co.*, 80 N. Y. 71, have been held to be seamen, and they may sue under the Jones Act.

The respondent does not take exception in any way to those decisions which hold that employees rendering temporary harbor help in servicing a vessel do not pertain to navigation and are under the Longshoremen's Act. It seems sufficient, without specifying the various cases thus distinguished, to emphasize the factual differences by noting the duties of the claimant in the *South Chicago* case and herein. The coal passer in the *South Chicago* case was aboard for the purpose of using a stick to facilitate the flow of coal from his boat to the vessel being fueled. Occasionally he did some cleaning aboard the boat. He did not work while the boat was en route. He was paid an hourly wage. He slept and ate off ship. His employment was temporary and he was called each day as he was needed. We agree that such an employee is "in the position of longshoremen or other casual workers on the water" (Page 260). We respectfully submit that the character of the bargee Rusin herein was exactly contrary in all these respects and his duties were not those of longshoremen or casual worker.

IV. The Remedy Under the Longshoremen's Act Is Exclusive and Cannot and Should Not Be Made "Overlapping" for the Sake of Illusory Benefits From Alleged Finality.

Counsel for the respondent find themselves making an argument exactly contrary to that unsuccessfully urged by them as petitioners in *Loverich v. Warner Company*, 118 F. (2d) 690 (CCA 3rd, March 17, 1941), certiorari denied 313 U. S. 577. The *Loverich* case was an admiralty action under the Jones Act which the respondent company defended on the ground of lack of jurisdiction, but the Third Circuit Court of Appeals found for the libellant-bargeman who was held not subject to the Longshoremen's and Harbor Workers' Act (Page 694):

> "We believe that Loverich came within the exception (to Longshoremen's exclusive jurisdiction) as explained and applied by the Supreme Court in *South Chicago Coal & Dock Company v. Bassett*, (1940) 309 U. S. 251."

When the present case succeeded the *Loverich* case before the same Third Circuit Court of Appeals, that court followed its own decision and the denial of certiorari by this Court, and could find no distinction between the present case and the prior *Loverich* case (Record p. 17) "whose facts as to the employee's duties and services aboard the barge are indistinguishable from the facts in the instant case". The *Loverich* case is not only on all fours with the present case, but concerns the same employer, the same employment, the same locale, the same working conditions and the same responsibilities.

Counsel for the petitioner has attacked the *Loverich* decision on two specific grounds of distinction, and at-

tempted to by-pass it on the general ground of allowable inconsistency. When it is stated (Petitioner's Brief p. 34) that the Longshoremen's Act of 1927 was not involved in the *Loverich* case because the accident occurred in 1926, the fact is ignored that the claim for indemnity was dismissed and liability was found only for maintenance and cure which arose long after the termination of the employment of Loverich and after the enactment of the Longshoremen's Act in 1927. When it is stated that the Third Circuit Court of Appeals in the *Loverich* case erred in relying upon the claimant's attainments rather than upon his duties (Petitioner's Brief p. 34), counsel overlooks the express finding upon this point. The language of the Third Circuit Court itself is explicit (Record p. 16):

> "We fail to see any material differences in the facts of the two cases. It is true that in the Loverich case, in specifying the duties of the bargeman and the circumstances under which he performed them, we mentioned that Loverich was a licensed junior engineer and qualified as an able seaman, barge master and second and third mate. But these added attainments of the particular employee were not what constituted him a seaman. The determining factors were the duties he was called upon to perform and the circumstances under which he was required to perform them. The question concerned his actual duties."

The argument that "the (Loverich) decision does not bar a contrary (Rusin) view" (Petitioner's Brief p. 18), or in other words that the Jones Act and the Longshoremen's Act are optional remedies with contrary rules and results, presents the fundamental issue urged by petitioner before this Court. That issue is, can the Court reach one appellate judgment under the Jones Act based on the char-

acter of the duties of a bargee and a completely contrary appellate judgment on the same set of facts under the Longshoremen's Act? No requirement for administrative expedition justifies flatly contrary decisions from the same court.

The petitioner seems to feel that present inconsistencies are so numerous that more would not be too harmful (Petitioner's Brief p. 20): "Even if the result of the principle of finality is an increased likelihood of inconsistent results on similar facts, the administrative benefits from the rule would far outweigh any such objection." This is the counsel of desperation and petitioner must have grave doubts as to the validity of his attempts at definition to conclude with such a plea. Petitioner concedes Rusin could be "inferred" to be a "master or member of a crew", and finally argues it makes no difference how we classify him because the courts must cooperate in being expeditious if wrong.

It is difficult to see how administration is ever promoted by encouraging inconsistency. Any elementary dictionary shows the two states of finality and inconsistency are opposite. How the establishment of the individual sanctity of a multitude of deputy commissioners or the removal of uniformity of appeal in all cases will do more than compound confusion is hard to understand. Whatever of inconsistency has heretofore existed can and will be remedied to the greatest extent possible by a definitive decision from this Court establishing bargemen with duties such as Rusin within the exemptive class.

The petitioner makes no reference to the fact that Sec. 5 of the Longshoremen's Act makes the remedy exclusive. This was clearly understood in *South Chicago v. Bassett*, 309 U. S. 251, 256:

> "For those employees who are entitled to compensation, the remedy under the Act is exclusive. Sec. 5. This made inapplicable to such employees the provisions of Sec. 33 of the Merchant's Marine Act (called the Jones Act) which carried to 'seamen' at their election the benefit of the Federal Employer's Liability Act."

This was the clear understanding in the immediately subsequent case of *Carumbo v. Cape Cod S. S. Co.*, 123 F. (2d) 991, 994, where the First Circuit Court of Appeals held the two actions mutually exclusive, using the following language:

> "If the plaintiff is a 'seaman' under the Jones Act and a 'member of a crew' under the Longshoremen's Act, then he is free to sue under the Jones Act. If he is not a 'member of a crew' under the Longshoremen's Act, he must proceed under that Act and he is not entitled to maintain this suit under the Jones Act."

The terms of the Longshoremen's Act and the decisions of this Court deny the petitioner's conclusion that (Brief p. 22): "The setting aside of the Deputy Commissioner's award herein on the theory that the Longshoremen's Act and the Maritime law cannot overlap and are mutually exclusive, is squarely contrary to the principle of the *Davis* case."

In *Davis v. Department of Labor*, 317 U. S. 249, this Court considered the problem of conflicting state and federal jurisdiction over claim for the death of a steel worker who was also a harbor worker temporarily on navigable waters. The Washington state compensation act provided it should embrace all employees not covered by maritime law whereas the Longshoremen's Act provides in Sec. 3

that it covers "only . . . if compensation proceedings may not be validly provided by state laws." This Court relied upon the presumption of constitutionality of the state statute in reversing four state tribunals and permitting recovery under the state act, at the same time conceding that it was possible to find jurisdiction in either the state or federal courts. The majority opinion was centered on the problems raised by the interpretation of Article III Par. 2 of the federal constitution by this Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216.

Now petitioner desires to extend the uncertainties inherent in *Davis v. Department of Labor* by permitting the Longshoremen's Act jurisdiction to overlap with that of the Jones Act. This would put the employer in triple jeopardy. Giving the employee three optional remedies would be no kindness but only increase the murkiness of the multiple twilight zones created.

This Court rejected this overlapping theory in the *Davis* case itself by intimating that Sec. 5 of the Longshoremen's Act became fully effective immediately it was determined that the jurisdiction was federal rather than state. On page 256, this Court said:

> "That section (5) gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line, and is no assistance *in discovering* on which side he can properly be placed."

It is of some importance to note that any attempt to permit the claimant to elect to proceed under either the Jones Act or the Longshoremen's Act or the State Compensation Act will make it impossible for the employer to know his liabilities.

V. The Conclusion of the Circuit Court of Appeals That Claimant Rusin Was a Master or Member of the Crew Was Well Founded in Fact and in Law.

Rusin was permanently connected with his vessel day in and day out, living, eating and sleeping there, paid by the month. He had no shore duties and no cargo duties. His were the humble duties of the seafaring seaman rather than those of the licensed personnel, but he was exclusively concerned with the operation of his vessel, under way and at all times. His duties pertained to navigation, and in the fundamental use of the terms he was "a master or member of a crew" necessary to the safety and operation of his vessel.

The basic facts competently found by the Commissioner rightly call for the conclusion of the Third Circuit Court of Appeals, that the petition in the nature of an appeal from the Deputy Commissioner should be allowed and the claim under the Longshoremen's and Harbor Workers' Act should be dismissed.

Respectfully submitted,

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